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Comment

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COMMENT

FIRST AMENDMENT—COMMERCIAL SPEECH—ATTORNEY ADVERTISING—KENTUCKY SUPREME COURT HOLDS ATTORNEY ADVERTISING IN THE FORM OF PRIVATE MAILINGS PROTECTED BY THE CONSTITUTION. *Kentucky Bar Ass'n v. Stuart,* 568 S.W.2d 933 (Ky. 1978).

In *Kentucky Bar Association v. Stuart,*[1] the Supreme Court of Kentucky dismissed a complaint charging members of a law firm[2] with unethical and unprofessional conduct for mailing to real estate agencies letters advertising and pricing legal services available through the firm. The letters, written on the firm's stationery, read as follows:

> This is to advise you that our office handles all aspects of legal work concerning real estate transactions. Our fees are as follows:
>
> | | |
> |---|---|
> | Opinion of title: | 50.00 |
> | Deed preparation: | 15.00 |
> | Mortgage preparation: | 15.00 |
>
> We guarantee that every Opinion of Title from our office is researched by an approved attorney who is a member of the Kentucky Bar Association. We also guarantee that if there are no objections to title or encumbrances which must be resolved as to title, that our opinion will be delivered to the lending institution within 48 hours of the date of your order. We thank you for your time and consideration in this matter.
>
> Sincerely yours,
> Thompson & Stuart[3]

The court, citing *Bates v. State Bar of Arizona,*[4] declared first

1. 568 S.W.2d 933 (Ky. 1978).

2. Flora Stuart and Kelly D. Thompson of the firm Thompson & Stuart.

3. 568 S.W.2d at 933.

4. 433 U.S. 350 (1977). Appellants in *Bates* established a legal clinic "to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid." *Id.* at 354. To generate needed business, appellants in *Bates* placed an advertisement in the February 22, 1976, edition of the Arizona Republic, a large metropolitan daily newspaper in Phoenix. The routine services advertised were uncontested divorce, uncontested adoption, simple personal bankruptcy, and change of name. Prices and court filing fees were given for each service. Following review by a special committee of the Arizona State Bar and by the Bar's Board of Governors, the Arizona Supreme Court found appellants in violation of a disciplinary rule proscribing attorney advertising. *In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976). On appeal, the United States Supreme Court affirmed unanimously the Arizona court's holding that state regulation of attorney advertising is

amendment protection of attorney advertising,[5] even in privately mailed form, "beyond dispute . . . unless the Association can justify prohibition of such speech by an interest which will outweigh individual and societal interests in the commercial speech."[6] The complainant bar association argued that attorney advertising through private mailings would be difficult to regulate and would present an increased possibility for deceiving potential consumers of legal services. The court, however, found those justifications insufficient to warrant restraint of this type of commercial speech.

The Kentucky Bar Association's Trial Committee, following a full hearing on the matter,[7] found that practitioners had violated DR 2-103(A) of the ABA Code of Professional Responsibility, adopted as a court rule by the Supreme Court of Kentucky: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."[8] The Trial Committee recommended that the attorneys receive a private reprimand.[9] The Association's Board of Governors agreed with the committee's "finding that the letters constituted 'in-person solicitation,' not advertisement . . . ,"[10] but recommended increasing the sanction to a public reprimand.[11]

In its unanimous, per curiam opinion, the Supreme Court of Kentucky specifically rejected the characterization of the letters as in-person solicitation, noting that "[n]one of the evils are present here which exist in the case of 'in-person solicitation.'

not forbidden by §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1—2 (1970), but reversed in a five to four decision the judgment of the Arizona court that application of the disciplinary rule to appellants did not offend the first amendment. The Court held that a state may not "prevent the publication in a newspaper of . . . truthful advertisement concerning the availability and terms of routine legal services." 433 U.S. at 384.

5. The court relied exclusively on the *Bates'* notion of constitutionally protected commercial speech. No provision of the state constitution was cited in the opinion.

6. 568 S.W.2d at 934.

7. The president of the state bar association initiated the disciplinary proceedings in *Stuart* under KY. CT. APP. R. 3.140. Although the bar association prevailed in the initial stages of the proceedings, the attorneys remained "respondents" throughout the action because, according to KY. CT. APP. R. 3.390, the trial committee and the board of governors can only *recommend* discipline. Furthermore, "[a]ny order recommending to the court that disciplinary action be taken shall be advisory. Promptly after the filing of the order of the board the director shall file with the clerk the entire record commencing with the charge . . . ." *Id.*

8. KY. CT. APP. R. 3.130; *cf.* S.C. SUP. CT. R. 32, DR 2-103(A).

9. 568 S.W.2d at 933.

10. *Id.* at 933-34.

11. *Id.* at 934.

There is not even the danger of exertion of pressure or demands to encourage a person to make a speedy and possibly uninformed decision whether to seek an attorney's assistance with a problem."[12] This preliminary distinction removed *Stuart* from the purview of *Ohralik v. Ohio Bar Association*[13] in which the United States Supreme Court held state restriction of in-person solicitation constitutionally acceptable.

After ruling out solicitation,[14] the Kentucky court characterized the correspondence as a form of attorney advertising, regulation of which is governed by the *Bates* decision holding newspaper advertisement of routine legal services constitutionally protected. The court did, however, consider the difference between public advertising in *Bates* and private mailings in *Stuart:*

> It is argued that by permitting private mailings two evils may result which do not exist in the case of newspaper advertisement and that this creates a sufficient interest to justify prohibition. First, there is greater potential for overreaching and deceptive practices by unscrupulous attorneys. Second, enforcement of ethical standards of attorney advertisement will become difficult, if not impossible for the Association.[15]

The court countered the first of these arguments by noting that advertisement by attorneys in private letter form is no more likely to proliferate deceptive practices[16] than the public advertisement

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12. *Id.*

13. 436 U.S. 447 (1978). In *Ohralik,* appellant

> approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women . . . . He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer.

Id. at 467.

14. By distinguishing the attorneys' conduct from solicitation, the court impliedly concurred in the generally accepted distinction between advertising and solicitation. The former refers to "activities which seek to inform, notify or persuade the public, but without the use of person-to-person encounter"; the latter refers to "similar activities involving personal contact." Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available,* 81 YALE L.J. 1181, 1181 n.4 (1972). *See generally* Note, *Advertising, Solicitation and Legal Ethics,* 7 VAND. L. REV. 677 (1954).

15. 568 S.W.2d at 934.

16. One of the evils of in-person solicitation suggested by complainant bar association is, however, adaptable to private mailings:

> If respondents' argument . . . is carried to its logical conclusion, it is not difficult to envision a parade of horribles that could do little more than bring wide-

approved by the United States Supreme Court in *Bates*.[17] In dealing with the problem of enforcement, the court in *Stuart* observed that "[a]mple protection may be assured the public by promulgation of a rule which requires the attorney to mail a copy of such advertisements to the Association simultaneously with the mailing of one or more of them to members of the public."[18]

I. THE *Stuart* DECISION: NOT REQUIRED BY *Bates*

Holding for the attorneys, the Supreme Court of Kentucky found the private mailing in *Stuart* and the public advertisement in *Bates* constitutionally indistinguishable. The court was thus able to maintain logical consistency in applying the notion of *protected* commercial speech,[19] as extended to legal advertising in

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spread disrepute to the bench and bar. As an example, an attorney, under respondents' argument would have a constitutional right to scour the obituary column of the local newspaper, personally contact the potential heirs of the deceased in the midst of their grief, and boldly recommend his legal services for the purposes of settling the estate.

Response to Petition for Review at 7.

While the argument is a bit overstated in light of *Stuart*'s determination that the case involved attorney advertising and not personal solicitation, the potential for mass mailings by Kentucky attorneys exists after *Stuart*.

17. 568 S.W.2d at 934.

18. *Id.*

19. The now discarded doctrine of *unprotected* commercial speech inauspiciously began in Valentine v. Chrestensen, 316 U.S. 52 (1942). In *Chrestensen*, respondent was barred by New York authorities, pursuant to a city ordinance, from distributing handbills advertising his display of a submarine. Following the city's initial disapproval of the advertisement, respondent expanded his handbill to two sides of text, one containing political commentary and the other containing a revision of the earlier advertisement. Upon police restraint of respondent's distribution of the double-faced handbill, he sought and was granted interlocutory and permanent injunctions. A divided court of appeals affirmed. 122 F.2d 511 (2d Cir. 1941). The United States Supreme Court, unanimously reversing, held that while freedom of communication in public thoroughfares cannot be unduly burdened by government, "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54. The state of the law between the *Chrestensen* case and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (*Virginia Pharmacy Board*), was at best confusing. *See* Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); New York Times v. Sullivan, 376 U.S. 254 (1964); Cammarano v. United States, 358 U.S. 498 (1958). *See generally* Freedman, *Advertising and Solicitation by Lawyers: Legal Ethics, 'Commercial' Speech, and Free Speech* in ADVERTISING AND FREE SPEECH 67 (1976); Note, *Freedom of Expression in a Commerical Context*, 78 HARV. L. REV. 1191 (1965); Note, *The Constitutional Status of Commercial Expression*, 3 HAST. CONST. L.Q. 761 (1976); Student Project, *Attorney Advertising: Bates' Impact on Regulation*, 29 S.C.L. REV. 457 (1978); Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677 (1954); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972). In *Virginia Pharmacy Board*, the Court considered the constitutionality of the prohibition

Bates, to the situation in *Stuart*. But whether the outcome of *Stuart* was jurisprudentially required by the *Bates* decision, as the Kentucky Supreme Court suggested,[20] is highly questionable. The *Stuart* decision more reasonably can be said to represent a major extension of *Bates*, which explicitly dealt only with "whether lawyers . . . may constitutionally advertise the *prices* at which certain routine services will be performed."[21]

The distinctions between the two cases are far more complex than the *Stuart* opinion reveals. As noted, the limitation of *Bates* to routine legal services was explicit. Accordingly, the Court enumerated specific services within the reach of its holding: "The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like . . . ."[22] The attorneys who advertised in *Bates* had carefully restricted the scope of their advertisement by prefacing each offered legal service with the word "uncontested," except for name changes, which are typically uncontested proceedings. In so wording their advertisement, appellants in *Bates* left no doubt in the reader's mind about the nature of the service offered for the price advertised. In contrast, the language describing offered legal services in the *Stuart* letters was unqualified; the attorneys did not restrict their offer to routine, residential real estate transactions.

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of pharmaceutical advertising and observed that "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us. Our pharmacist does not wish to editorialize on any subject . . . . The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' " 425 U.S. at 760-61. Holding truthful commercial speech constitutionally protected, the Court reflected that the advertising ban was indicative of the state's decision not to expose its citizens to certain types of expression. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770.

20. The court justified most of *Stuart*'s major premises by relying on *Bates* as authority and by reading *Bates* as holding constitutional protection for attorney advertising "beyond dispute." 568 S.W.2d at 934. Furthermore, the court relied on *Bates* to support "[t]he fact that an advertisement . . . in the form of a letter does not increase the likelihood" of deceptive practices by attorneys. *Id.*

21. 433 U.S. at 367-68 (emphasis in original).

22. *Id.* at 372. Justice Powell quarrelled with the majority's use of the phrase "and the like":

> [The Court divides] the immense range of the professional product of lawyers into two categories: "unique" and "routine." The only insight afforded by the opinion as to how one draws this line is the finding that services similar to those in appellants' advertisement are routine. . . . What the phrase "the like" embraces is not indicated.

Id. at 391-92 (Powell, J., joined by Stewart, J., concurring in part, dissenting in part).

The prices quoted ostensibly yet illogically and impractically appear to apply regardless of the physical size of the estate or the quantum of the fee sought to be granted.

The court in *Stuart* need not have extended first amendment protection to such potentially misleading advertisements because the *Bates* Court recognized that

> the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. . . . In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.[23]

Standards in lawyer advertising are therefore higher than standards for dissemination of other forms of regulated commercial speech. Legal information intended for ultimate public consumption, although routed through a middleman as in *Stuart,* logically still would have to conform to the higher standard.

A further distinction can be drawn between *Stuart* and *Bates* by focusing upon the advertising targets in the two cases. Recipients of the *Stuart* letters were realtors already aware of the need for legal advice in real estate transactions, while in *Bates* the advertising consumers were simply members of the general public. This distinction is significant. Several of the key grounds upon which the *Bates* decision rested, notably the elimination of public ignorance of the cost of legal services[24] and the fostering of informed access to the legal system,[25] are less significant when the advertising target is not a member of the general public.[26] Specifi-

23. 433 U.S. at 383. The notion that even slightly misleading commercial speech might lose its first amendment protection finds further support in *Virginia Pharmacy Board* in which the Court noted:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," [citation omitted] and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

425 U.S. at 771-72 n.24.

24. *Id.* at 375-76.

25. *Id.* Of course, the *Bates* Court rejected the medieval notion that a lawsuit is an evil in itself and was unable to "accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." 433 U.S. at 376. *See also* Radin, *Maintenance by Champerty,* 24 CAL. L. REV. 48, 72 (1935).

26. Although the court in *Stuart* did not consider that the realtors who received the

cally, the Court in *Bates* pointed out that probably those whose access was burdened most by the general advertising ban were the "not-quite-poor and the unknowledgeable."[27] While the *Bates* Court found this a convincing reason to lift the general ban, this aspect of the *Bates* rationale cannot be viewed as supportive of or applicable to *Stuart* because the *Stuart* letters were not dispatched to the general public.

II. *Stuart* AS AN EXTENTION OF *Bates*

The *Bates* opinion, therefore, did not require the result reached by the court in *Stuart*. The overall advisability of *Stuart* as an extension of *Bates* is, however, entirely another matter. The advisability must be considered in light of *Stuart*'s likely impact upon consumers of legal services, because the doctrine of *protected* commercial speech as clarified in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Pharmacy Board),*[28] places primary emphasis on the consumer's right to receive information[29] rather than on the advertiser's first amendment right to disseminate it. *Virginia Pharmacy Board,* which involved advertising of prescription drug prices, was of paramount importance to the decision on attorney advertising. The Court in *Bates* recognized this, commenting, after restating the facts and law involved in *Virginia Pharmacy Board:*

> We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it. Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance.[30]

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letters were middlemen in the flow of commercial speech, respondents suggested in their petition for review that such a mailing was less offensive than a direct mailing to prospective clients: "The [attorneys] beg to differ with the findings of the Bar that these letters were mailed to prospective clients. These letters were mailed to educated realtors . . . ." Petition for Review of Findings of Fact, Conclusions of Law, Opinion and Order of Board of Governors, Ky. Bar Ass'n, at 1-2. While this distinction by the attorneys is valid, it cannot be used to justify the court's analytical sidestepping of *Bates*.

27. 433 U.S. at 377. *See generally* B.F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970).

28. 425 U.S. 748 (1976).

29. *See generally* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); *cf.* Procunier v. Martinez, 416 U.S. 396 (1974); Lamont v. Postmaster General, 381 U.S. 301 (1965).

30. 433 U.S. at 365.

Although the Court in *Virginia Pharmacy Board* did mention that the first amendment protects pharmacists wishing to advertise prescription drug information, it quickly dispensed with that notion and emphasized the interest of the consumer and of society in the commerical speech.[31] This emphasis suggests that the proper focus is upon the consumer's right to receive information, rather than upon the advertiser's first amendment rights. Similarly, the right of the public to receive properly tailored *legal* advertising, as that right was established by *Bates*, is ostensibly firmer than any constitutional right of the lawyer to advertise. With legal advertising, further justification exists for diverting the first amendment focus from the advertiser: attorneys, like pharmacists, belong to a profession that is both licensed and heavily regulated. Indeed, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "[32] Moreover, the Court has, in the past, considered a "lawyer's procurement of remunerative employment" as "a subject only marginally affected with First Amendment concerns."[33]

In considering *Stuart*'s impact on consumers of legal services, the United States Supreme Court's view of the nature of consumer interest in commercial speech therefore should be examined. In *Virginia Pharmacy Board*, the Court observed that

> the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . .
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.[34]

The Supreme Court also characterized the consumer interest in the flow of commercial information as a concern that private economic decisions, which so affect the allocation of resources in our "predominantly free enterprise economy," be reached intelligently.[35] Additionally, the Court in *Virginia Pharmacy Board* considered the democratic system of government well-served by

31. 425 U.S. at 762.
32. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).
33. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978).
34. 425 U.S. at 763-64.
35. *Id.* at 765.

the free flow of commercial information, which is "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[36]

Examining *Stuart* in light of these interests is not a straightforward task because the commercial speech at issue in both *Virginia Pharmacy Board* and *Bates* flowed directly from the advertisers to potential consumers. The commercial speech involved in *Stuart,* however, flowed from advertisers to realtors who, as middlemen, were in a position to pass on the information to the general public. Notwithstanding this distinction, the appropriate analytical approach would parallel *Bates'* emphasis on the potential consumer of the legal services rather than the middleman, because as *Bates* noted, laxity in advertising regulation could be detrimental to the misled layman.[37]

A member of the public is unlikely to receive the information contained in the *Stuart* letters in the information's original form. Rather, he would receive the information through conversation with the initial recipient of the advertising, the realtor.[38] The practical consequences of a realtor's receipt of a *Stuart* letter would depend in large measure on his relationship with the attorneys involved. If the realtor knew and respected the firm, he would be favorably disposed to recommend its services to his unrepresented customers; however, if the realtor was totally unfamilar with the firm, he would be unlikely to suggest its services to his customers. Hence, even when the commercial information is passed on from a middleman to a member of the public in need of retained counsel, the information is secondhand and highly

36. *Id.*

> [The theoretical basis for constitutionally protecting any speech is that] it conveys information necessary to the exercise of our duties as citizens, allowing a reasoned and intelligent decision on public issues. Commercial speech performs this same decision-making function. In a free-market economy, commercial information is necessary so that consumers may make intelligent choices in the marketplace. Without an adequate supply of price and product information, consumers are forced to make blind choices. Thus, like speech concerning general political or social topics, commercial speech must be protected to preserve a system of free and independent choice.

Comment, *The Demise of the Commercial Speech Doctrine and the Regulation of Professional's Advertising: The Virginia Pharmacy Case,* 34 WASH. & LEE L. REV. 245, 256-57 (1977).

37. 433 U.S. at 383-84.

38. Once the decision has been made to regulate attorney advertising through private mailing, the logical course is to regulate at the source. In a *Stuart* situation, attempting to regulate the middleman would be contrary to the traditional, word-of-mouth manner public information about attorneys has always circulated.

susceptible to unintentional distortion.

Fear that the middleman in *Stuart* advertising situations would inadequately communicate the advertising information, however, is not itself a sufficient basis for restraining the private mailings[39] because, as the Court in *Bates* observed, "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision."[40] Yet the *Stuart* letters were plagued with another, far more complex infirmity. The services offered in the advertising language of the *Stuart* letters were unqualified, and as discussed earlier, could be misleading. This factor, placed into the commercial speech balancing process,[41] arguably tips the scale in favor of state regulation; *Virginia Pharmacy Board* and *Bates* leave no room to dispute the constitutional propriety of a state's "dealing effectively"[42] with the problem of "[a]dvertising that is false, deceptive, or misleading . . . ."[43] Additionally, "any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability."[44] *Bates,* therefore, should not be read as precluding a state's reasonable regulation of *Stuart*-type attorney advertising.

III. Attorney Advertising in Privately Mailed Form After *Stuart*

The position that the language of the letters involved in *Stuart* was ambiguous and hence the proper subject of state restraint, while at odds with the opinion of the Kentucky court, does not necessarily exclude the view that well-tailored private mailings by attorneys to middlemen *or members of the public* are entitled to constitutional protection. The parameters set by the

39. This view is based upon the notion that "[u]nlike other varieties of 'second class' speech like libel, obscenity, or fighting words, commercial speech is not in itself harmful." Comment, *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated,* 43 Mo. L. Rev. 64, 79 (1978). *See also* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 Geo. Wash. L. Rev. 429, 431 (1971).

40. 433 U.S. at 374.

41. "After balancing the interests involved, the outcome is measured against the degree of abridgement of the commercial expression." Comment, *supra* note 38, at 79.

42. *Virginia Pharmacy Board,* 425 U.S. at 771.

43. *Bates,* 433 U.S. at 383.

44. *Id.*

Court in *Bates* for public advertising by attorneys could adequately govern private legal advertising. Accordingly, had the *Stuart* letters referred exclusively to transactions capable of routine disposition, and had the offer of legal services been limited strictly to that disposition, the private mailings could justifiably claim first amendment protection. Indeed, under this fact situation one could properly invoke the authority of *Bates* to logically compel the result. The consumer interest in a real estate agent's receipt of even a well-tailored *Stuart*-type private advertising letter is not overwhelming, yet neither is the state's interest in restraining it. The Kentucky court, however, having failed to strictly apply *Bates* advertising standards to the *Stuart* case and having allowed the language of *Stuart* letters to pass as acceptable attorney advertising, has opened the door to the dangers appurtenant to vague and misleading advertising.

The *Stuart* court's plan for enforcement of ethical standards of attorney advertising in private mailings through a rule requiring lawyers so advertising to mail copies to the bar association may well be stifled by the difficulty in distinguishing between deceptive and nondeceptive advertising in light of *Stuart*'s permissiveness. Such a plan nevertheless would adequately monitor private mailings tailored to *Bates* advertising standards.

Kentucky Bar Association v. Stuart, in extending first amendment protection to a vaguely worded privately mailed legal advertisement, is inconsistent with the paramount consumer interests in professional advertising identified by the United States Supreme Court in the *Bates* and *Virginia Pharmacy Board* decisions. If the Kentucky court sought to extend constitutional protection of attorney advertising to private mailings, the court would have been well advised to await a case involving private advertisement that adhered to the *Bates*' requirements of linguistic precision and routineness of services offered. While some state courts are likely to opt for first amendment protection of *properly restricted* privately mailed legal advertising, it is unlikely that the *Stuart* decision will persuade other jurisdictions to adopt its lenient advertising standards.[45]

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45. In the wake of *Bates,* but prior to the *Stuart* decision, the Tennessee Supreme Court considered adoption of a court rule permitting private mailing advertising by attorneys. The court, however, found that such advertising "by the use of handbills [and] circulars" would pose "insurmountable problems in enforcement." *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638, 644 (Tenn. 1978). Moreover, the court noted that such advertising is "unnecessary to a proper enjoyment of the constitu-

tional right of commercial speech." *Id.* In addition, a *Stuart*-type issue is the subject of a disciplinary proceeding underway against two New York attorneys for having mass mailed over 7,500 advertising letters to both real estate brokers and homeowners. 3 PROF. LIAB. RPTR. 145 (1979).